Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA and CALIFORNIA STATE BOARD OF EQUALIZATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the United States, in pursuing a claim for a refund of state taxes paid by a government contractor allegedly assessed in violation of state law, must exhaust the State's administrative remedies.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments, including questions of state taxing authority and procedure. *Amici* believe that the Court's decision in this case will have a substantial impact on the finality of state and local governments' assessment and collection of taxes.

While the common law recognizes the right of a taxpayer to seek the restitution of illegally exacted taxes, it also recognizes that such suits are disruptive of fiscal planning by government. Accordingly, the common law has long required a party seeking restitution of taxes to have exhausted administrative remedies. This case offers no reason to excuse the United States from compliance with this rule. *Amici* further submit that any rule excusing the United States from compliance with California's refund procedures would disregard the sovereignty of the States under our Constitution in an area vital to their existence as sovereigns.

Because the Court's decision will have a direct impact on this issue of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT OF THE CASE

This case arises out of California's assessment of Williams Brothers Engineering Company (WBEC), a contractor of the United States, for sales and use taxes on personal property WBEC purchased in performance of its contracts. From 1975 through 1981, WBEC contracted with the Department of Energy and the Department of the Navy to manage oil drilling operations at Naval Petroleum Reserve No. 1 in California. J.A. 7, 9-10. Under the contracts, WBEC received a management fee and

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

was reimbursed for various costs, including sales and use taxes it incurred in performing the contracts. *Id.* at 8. Under the contracts, WBEC had authority to, and entered into, subcontracts for construction work. *Id.* at 28. Pursuant to its management of the subcontractors, WBEC purchased personal property for their use in the performance of construction, *id.* at 27-28, but failed to pay California sales and use taxes on these purchases.

On July 5, 1978, upon an audit of WBEC covering the period November 14, 1975, through December 31, 1977, the California Board of Equalization (Board) issued a Notice of Determination assessing WBEC for $2,932,716.54 plus interest for sales and use tax under Cal. Rev. & Tax. Code § 6384. *Id.* at 22. Section 6384 taxes "the gross receipts from the sale of any tangible personal property to contractors purchasing such property . . . as the agents of the United States . . . for use in the performance of contracts with the United States for the construction of improvements on or to real property. . . ." Cal. Rev. & Tax. Code § 6384 (Deering 1975 & Supp. 1992).

On August 3, 1978, WBEC filed a Petition for Redetermination with the Board. J.A. 22. A hearing was held before the full Board on January 8, 1981. *Id.* 51. Although the United States did not intervene in the proceeding, it did direct WBEC in the litigation. *Id.* 57-58; Pet. A. 2a. At the hearing, WBEC argued that the assessment was illegal, contending that section 6384 taxes only purchases of personal property made by a construction contractor. J.A. 66. WBEC maintained that it had acted as a "procurement officer," not a construction contractor, and thus the purchases it made for the construction subcontractors were not taxable. *Id.*

By a decision issued on April 13, 1982, the Board rejected WBEC's interpretation of section 6384 and upheld the assessment.[2] J.A. 22. On May 13, 1982, WBEC

[2] The Board did reduce the assessment by approximately $400,000, J.A. 9, for reasons not clearly indicated in the record.

paid the assessment under protest and, on October 1, 1982, filed a claim for a refund again challenging the applicability of section 6384. *Id.* On November 22, 1982, the Board denied the claim. *Id.* Thereafter, on February 18, 1983, WBEC filed a refund suit in California Superior Court. *Id.* 21.

Meanwhile, on December 13, 1982, the Board, again upon audit, issued a Notice of Determination assessing WBEC for $7,483,062.36 plus interest for sales and use taxes due for the period January 1, 1978, through December 31, 1981. J.A. 33. On January 12, 1983, WBEC paid the assessment under protest and filed an administrative refund claim on May 25, 1983, again challenging the applicability of section 6384. *Id.* On August 2, 1983, the Board denied the claim and, on October 26, 1983, WBEC filed a refund suit in California Superior Court with respect to this assessment as well. *Id.* at 33.

In the refund suits, WBEC sought a total of 14 million dollars and argued that section 6384 was inapplicable to its purchases of personal property for use by the construction subcontractors and government personnel. J.A. 21-23, 32-34. The United States did not intervene in either suit. *Id.* 44-49. In January 1988, WBEC voluntarily dismissed both suits without prejudice after the Board agreed to refund $3 million covering the taxes assessed on personal property used by government personnel. *Id.* 46, 49-50.

Thereafter, on May 12, 1988, ten years after the original Notice of Determination, the United States sued California in federal district court seeking a declaration that section 6384 was not applicable to WBEC's purchases of personal property for the construction subcontractors and a refund of $14 million covering the allegedly illegal assessment plus interest. J.A. 5-11. The parties filed cross motions for summary judgment. Pet. A. 17a. The district court granted California's motion, holding that the United States' failure to file suit within ninety days of the denial of WBEC's administrative claim con-

stituted a waiver of its refund claim. Pet. A. 19a-20a. The district court rejected the United States' argument that the six year statute of limitations of 28 U.S.C. § 2415(a) applied, holding, in essence, that the United States had no claim because it had failed to comply with the ninety day filing period and timely filing was "a condition precedent to liability." *Id.* The district court also concluded that the United States had not made out a case of unjust enrichment. *Id.* 20a-23a. The district court noted that the United States was seeking to relitigate WBEC's entitlement to "a state-created exemption from a state-created sales tax regulation," that without the exemption neither WBEC or the United States "would have a claim [for] 'unjust enrichment,'" and that there was no "unjustness in the state procedures." *Id.* 21a-23a. The United States appealed.

The court of appeals affirmed. The court first recognized that the challenged tax did not implicate the United States' immunity from state taxation under the Supremacy Clause. *Id.* 3a-6a. The court of appeals next held that the United States' claim did "not involve classic unjust enrichment" but was instead "posited upon the interpretation of a state-created exemption from a state created sales tax." *Id.* 9a. Finally, the court of appeals concluded that because section 2415(a) did not by itself confer a cause of action and the United States had failed to file its suit within 90 days of the denial of WBEC's administrative claims, the United States had failed to satisfy an element of its cause of action. *Id.* 11a-12a.

SUMMARY OF ARGUMENT

1. While the common law recognizes the right of a taxpayer to seek the restitution of illegally exacted taxes in an action for money had and received (*indebitatus assumpsit*), it does "not provide for the restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 George E. Palmer, *The Law of Restitution*, § 14.20 at 246 (1978). Because of the potential disruption to the government's fiscal affairs

which a refund suit entails, it has long been the rule that no cause of action will lie unless the claimant has exhausted administrative remedies. *See First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 455 (1924); *cf. Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481 (1913). The United States, however, never filed an administrative refund claim in its own right, never petitioned for a redetermination of the tax under Cal. Rev. & Tax. Code § 6561, nor moved to intervene in WBEC's administrative refund claim. It therefore has not satisfied the elements of the cause of action for money had and received.

2. There is no sound reason for excusing the United States from complying with this element of the cause of action. In asserting a cause of action, the United States must establish a prima facie case on each element in the same manner as a private litigant. *See, e.g., United States v. Stinson*, 197 U.S. 200, 204-05 (1905). Moreover, the United States' claim for relief is premised on its having been taxed in violation of state law, Cal. Rev. & Tax. Code § 6384. Section 6384, however, is ambiguous as to whether the purchases of personal property WBEC made on behalf of the construction subcontractors were subject to tax. This ambiguity should have been resolved, in the first instance, by the State's administrative agency and not by federal judges who lack expertise in California's tax code. Nor can WBEC's filing of an administrative refund claim excuse the United States from compliance. As the United States argues, WBEC was a "disinterested" and "nominal party with no financial stake in the outcome." Brief of U.S. at 27. Given this, it was incumbent on the United States to present to the Board its own arguments on the proper construction of section 6384. Principles of federalism and "administrative autonomy require that the agency be given a chance to discover and correct its own errors." *See McKart v. United States*, 395 U.S. 185, 195 (1969).

3. Because the United States never complied with the exhaustion requirement, the Court need not decide whether

28 U.S.C. § 2415(a), which provides for a six year statute of limitations in "every action for money damages brought by the United States . . . founded upon a contract . . . implied in law," preempts Cal. Rev. & Tax. Code § 6933, which requires that a refund suit be filed within ninety days of the denial of an administrative claim. In the event the Court determines that it must decide the issue, *amici* submit that when a tax does not violate the United States' immunity from state taxation under the Supremacy Clause, the Tenth Amendment prohibits Congress from preempting a State's refund suit limitations period. As the Court has long recognized, the power to tax is at the core of sovereignty. *See, e.g., Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). Absent a violation of the Supremacy Clause, congressional preemption of California's limitation period "curtail[s] in . . . substantial manner [the State's] exercise of its powers" and violates the Tenth Amendment. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

Finally, even if Congress has the power to preempt California's limitations period, this Court has required that Congress make its intention "to alter the 'usual constitutional balance between the States and the Federal Government . . . unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (citation omitted). Section 2415(a) fails this critical test. Neither the statute nor its legislative history contain any indication that Congress considered the federalism implications of preempting California's limitation period and decided to do so anyway.

4. Contrary to the United States' assertion, the court of appeals' decision will not leave it without an effective remedy. The United States could have petitioned for a redetermination of the tax as well as moved to intervene in the proceedings. *See* Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992); Cal. Civ. Proc. Code § 387 (Deering 1991 & Supp. 1992). Moreover, the

United States had knowledge of the proceedings almost two years before the deadline for the filing of the administrative refund claim and thus had ample time to participate effectively in the process. J.A. 57-58. Finally, the United States' dire forecast that "confusion would reign" if its interests are "subordinated to the vagaries of a mosaic patchwork of procedure," Brief of U.S. at 27, overstates the effect of the court of appeals' decision. In order to vindicate its rights, the United States must necessarily be aware of the substantive tax law; it can surely master the State's refund procedures as well. The Court should accordingly decline the United States' request to grant it an "open season" for challenging state tax assessments.

ARGUMENT

I. THE UNITED STATES HAS NOT SATISFIED THE ELEMENTS OF THE CAUSE OF ACTION FOR MONEY HAD AND RECEIVED BECAUSE IT FAILED TO EXHAUST CALIFORNIA'S ADMINISTRATIVE REMEDIES

As an initial matter, it is important to recognize what is not in issue in this case. The United States' claim for restitution under the common law action for money had and received (*indebitatus assumpsit*) is not premised on its constitutional immunity under the Supremacy Clause from state taxation. *See, e.g., United States v. New Mexico*, 455 U.S. 720 (1982). As both the United States and the court of appeals recognized, this case does not involve a tax which has been levied "directly upon the United States," *Mayo v. United States*, 319 U.S. 441, 447 (1943); nor a tax on an entity "'so intimately connected with the exercise of a power or the performance of a [governmental] duty'" so as to be "'a direct interference with the functions of government itself.'" *New Mexico*, 455 U.S. at 736 (*quoting James v. Dravo Contracting Co.*, 302 U.S. 134, 157 (1937)). Rather, the United States' claim is based solely on an issue of interpretation of state tax law—whether California erroneously assessed

WBEC under Cal. Rev. & Tax Code § 6384 and its implementing regulations, Cal. Sales & Use Tax Reg. 1521, for sales and use taxes on the purchases of personal property WBEC made on behalf of (and which was later installed by) the subcontractors it managed.

The United States' position—that it can now pursue a common law action for money had and received without complying with the State's administrative refund procedure—reflects a thorough disregard for the sovereignty of the States under our constitutional system. Moreover, the United States has failed to satisfy the elements of the common law action upon which it relies. "The common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 George E. Palmer, *The Law of Restitution*, § 14.20 at 246 (1978) (hereinafter, Palmer). The federal cause of action has long required that the party seeking restitution of illegally exacted taxes exhaust administrative remedies as a precondition to suit, *see First Nat'l Bank v. Board of Comm'rs*, 264 U.S. 450, 455 (1924); there is no claim for unjust enrichment until the taxing authority denies a refund claim. Given that the tax assessed here did not violate the Supremacy Clause, this case, although couched in terms of the common law action for money had and received, is fundamentally about the proper respect that the United States and the federal courts must accord the States in the administration of their tax systems.[3]

[3] In its brief to this Court, the United States, while acknowledging that section 6384 is not facially unconstitutional, nevertheless suggests that it might constitute "an unconstitutional direct tax on the United States" if it is "interpreted to apply to purchases of property for the United States by a federal contractor, such as WBEC, that did not make a beneficial use of the property." Brief of U.S. at 25 n.16. The constitutionality of the taxes assessed here is not, however, before the Court. In any event, the United States' suggestion is flawed for several reasons. First, under *New Mexico*, a contractor does not become an arm of the United States merely because the title on property it purchases passes immediately to the federal government. *See* 455 U.S. at 742-43. Rather, as long as the contractor has a "substantial independent role in making purchases . . . the identity of interests between the Government and the contractors is far from complete" and the tax does not implicate the Supremacy Clause. *Id.* at 743. The United States has not identified any of the factors which this Court has previously relied on in concluding that a contractor was a "constituent part[]" of the United States as present in the contractual relationship between the United States and WBEC. *Id.* at 741. And, in any case, California agreed to refund the taxes it assessed on the personal property purchased by WBEC which was used or installed by government personnel. Brief of U.S. at 7. It is clear, however, that this refund was not required by the Constitution.

Second, the inquiry under *New Mexico* is not whether the purchasing contractor itself makes a beneficial use of the property but whether the contractor "stand[s] in the Government's shoes." *New Mexico*, 455 U.S. at 736. It is beyond dispute that the subcontractors who installed the property would have been liable to California for the tax if they had themselves purchased the property. *See id.* at 741; *United States v. Boyd*, 378 U.S. 39, 44-47 (1964). It is illogical then to suggest, as the United States has, that a tax on the "middleman," here WBEC, violates the Supremacy Clause when the actual users of that property, i.e., the construction subcontractors, are pursuing "commercial activities carried on for profit" and are not "constituent parts" of the government. *Boyd*, 378 U.S. at 44, 47.

A. Under The Common Law, Exhaustion Of Administrative Remedies Is A Condition Precedent To The Right To Sue The Taxing Authority For Money Had And Received

As a species of quasi-contract, the common law action for money had and received has always been guided by equitable principles. *See, e.g.*, Frederick C. Woodward, *The Law of Quasi Contracts* § 3 at 5 (1913) (hereinafter, Woodward). As Lord Mansfield, in the landmark case of *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760), stated: "In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." 2 Burr. at 1012, 97 Eng. Rep. at 681. In its broadest application, the cause of action has two elements: (1) "[t]hat the defendant has received a benefit from the plaintiff" and

(2) "[t]hat the retention of the benefit by the defendant is inequitable." Woodward, § 7 at 9. Thus, the essence of the action is that the defendant's retention of the benefit received is unjust. *Id.* at § 9; *accord Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts*, § 1, comment c (reprint 1962) ("Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.") (hereinafter, *Restatement*); *see also Bayne v. United States*, 93 U.S. 642 (1876).

While the action for money had and received has been used to obtain the restitution of tax payments, the limitations on this use of the action are significant. As one commentator has noted, "[t]he common law does not provide for restitution of tax payments simply because the tax authority collected money to which it was not entitled." 3 Palmer, § 14.20 at 246. Particularly because the restitution of back taxes has great potential to disrupt the fiscal affairs of government, it has long been the common law rule that recovery will be denied where a tax has been voluntarily paid or no protest has been made. *See, e.g., City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) 720, 732 (1866); *Elliot v. Swartwout*, 35 U.S. (10 Pet.) 137, 153 (1836); *cf. Bend v. Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839). Even where objection has been made to a tax assessment, a taxpayer can waive that objection, thereby forfeiting his right to recover. *Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 Term 553, 100 Eng. Rep. 1171 (K.B. 1792)).

Finally, under the common law, compliance with the taxing authority's administrative refund procedures is a necessary element of the taxpayer's cause of action.[4]

[4] In criticizing the court of appeals' holding that California has not been unjustly enriched, the United States argues that "it is not correct to characterize the State's retention of funds improperly obtained from the United States as 'just' enrichment." Brief of U.S. at 21. This argument simply misapprehends the nature of the inquiry when a claimant seeks restitution of illegally exacted taxes. A taxing authority's retention of illegal taxes voluntarily paid is obviously not "just enrichment." The federal common law, however, did not require the taxing authority to refund such taxes. *See, e.g., City of Philadelphia v. Collector*, 72 U.S. (5 Wall.) at 732.

See First Nat'l Bank, 264 U.S. at 455 ("administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax"). As a leading authority explained:

> if the assessors, having jurisdiction over the person and property, and acting, so far as the record shows, in compliance with the requirements of a constitutional statute, fall into an error which affects the rights of a person assessed, the vacation or correction of their action, by appeal to the state board of revision or by other proper proceedings instituted for the purpose, *is a condition precedent to the right to sue for restitution.*

Woodward, § 237 at 375 (emphasis added). *See also Stanley v. Supervisors of Albany*, 121 U.S. 535, 550 (1887) ("To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property."); *Restatement*, § 75, comment (1)(a) ("it is frequently provided that there is to be no recovery unless specified steps are taken by the taxpayer, such as bringing proceedings before a board of tax appeals"); 72 Am. Jur. 2d *State and Local Taxation* § 811 (1974). California has codified this common law principle. *See* Cal. Rev. & Tax. Code § 6932 (Deering 1975 & Supp. 1992) ("No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund . . . has been duly filed" with the Board). California's rule is entirely consistent with the common law rule that compliance with administrative refund procedures is a condition precedent to the right to sue

for restitution. *See First Nat'l Bank*, 264 U.S. at 453-56; *Woodward*, § 237 at 375; *see also Stanley*, 121 U.S. at 550; 72 Am. Jur. 2d *State and Local Taxation* § 811 (1974).

As these principles demonstrate, the United States does not state a valid claim for money had and received. Because it failed to comply with the required administrative refund procedure, the United States has failed to satisfy a condition precedent to its right to sue for restitution. *See First Nat'l Bank*, 264 U.S. at 453-56.

In *First Nat'l Bank*, this Court recognized that exhaustion of administrative remedies is a condition precedent to the right to recover for taxes illegally exacted and is an element of the cause of action. There, plaintiff sued a county under the due process and equal protection clauses of the Fourteenth Amendment to recover property taxes it paid which it alleged were substantially higher than the taxes imposed on other property. 264 U.S. at 451-53. Under state law, plaintiff could have challenged the assessment before both the county commissioners and the state tax commission. *Id.* at 451. Plaintiff, however, chose not to do so and instead sued in federal district court, which sustained a demurrer to the complaint. *Id.* at 450. This Court affirmed, noting that:

> It is not suggested that . . . the requirement, already broadly recognized, that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax, could be dispensed with. And accepting the decision of the state court that such remedies were, in fact, open and available under the Colorado statutes, it could not be dispensed with.
>
> Plaintiff not having availed itself of the administrative remedies afforded by the statutes, as construed by the state court, it results that the question whether the tax is vulnerable to the challenge in respect of its validity upon any or all of the grounds set forth, is one which we are not called upon to consider.

Id. at 455-56 (internal citations omitted).

The exhaustion requirement is not a meaningless exercise but a "long-settled rule of judicial administration that *no one* is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (emphasis added). In the state taxation context, the rule serves several purposes.

First, it allows the state agency charged with administering the tax code to apply its expertise. *See McKart v. United States*, 395 U.S. 185, 194 (1969). As state tax codes have become increasingly complex, it is of vital importance that the state taxing authority be given the first opportunity to address a claim. Principles of federalism as well as "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *See id.* at 195. As the Court has recognized in the abstention context, federal courts are "outsiders without special competence in [state] law"; their "independent judgment regarding the application of that law" merits "little confidence." *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941). The Court has expressly recognized the need for deference to state decision makers when issues of state tax law are present. *See, e.g., Fair Assessment In Real Estate Ass'n v. McNary*, 454 U.S. 100, 108 n.6 (1981) (*quoting Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part) ("questions of state tax law, . . . like issues of state regulatory law, are more properly heard in the state courts")). Where, as here, the state taxing authority has previously addressed and rejected a contractor's claim that it is not liable for a tax, federal courts must exercise restraint because the very purpose of the United States' challenge to that tax in the federal courts is to obtain a ruling that creates a "federal conflict with the state policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943). Such a conflict could perhaps be justified if the tax arguably violated the Supremacy Clause. But where, as here, no such claim is presented, a rule that dispenses with the

exhaustion requirement will result in "'needless friction with state policies'" and reflects a disregard "'for the rightful independence of . . . state governments.'" *Id.* at 332 (*quoting Pullman*, 312 U.S. at 500-01).

An exhaustion requirement serves other purposes as well. The state authority may render a decision favorable to the claimant, obviating further litigation. *McKart*, 395 U.S. at 195. Moreover, where a constitutional question is present, allowing the state agency the first opportunity to interpret its statutes may render the question moot. *See, e.g., Pullman*, 312 U.S. at 498, 501. Finally, requiring exhaustion ensures that taxpayers will not engage in "frequent and deliberate flouting of administrative processes [which] could weaken the effectiveness of the [taxing authority] by encouraging people to ignore its procedures." *McKart*, 395 U.S. at 195.

While all of these reasons may not apply in a particular case, they conclusively demonstrate why exhaustion of administrative remedies is a condition precedent to the right to sue for restitution of taxes illegally exacted. And as with any other contract claim, the satisfaction of a condition precedent is an element of the plaintiff's cause of action. *See, e.g.*, 5 Samuel Williston, *A Treatise On The Law Of Contracts* § 674 (3d ed. 1961); 3A Arthur L. Corbin, *Corbin On Contracts* § 628 (1960 ed.); *see also Jones v. United States*, 96 U.S. 24, 27-28 (1878); *cf.* Fed. R. Civ. P. 9(c). Because of its failure to satisfy this condition, the United States has not established the elements of the common law cause of action for money had and received. The court of appeals thus properly held that California had not been unjustly enriched at the expense of the United States.[5]

[5] Nor can the United States' claim rest on derivative principles because California has not been unjustly enriched at the expense of WBEC. While WBEC protested the tax and pursued both the administrative refund procedure, *see* Cal. Rev. & Tax Code § 6902 (Deering 1975 & Supp. 1992), and a suit against the Board upon the denial of its claim, *see id.* § 6933, WBEC's subsequent voluntary dismissal of its suit constituted a waiver of its protest. *See Elliot*, 35 U.S. (10 Pet.) at 157 (discussing *Greenway v. Hurd*, 4 T.R. 553, 100 Eng. Rep. 1171 (1792)). In *Greenway*, the plaintiff sought the restitution of excise duties. 4 T.R. at 553, 100 Eng. Rep. at 1172. While the plaintiff initially objected and refused to pay the duties because the statute authorizing them had been repealed, plaintiff subsequently paid them. *Id.* The Court affirmed the trial court's grant of a nonsuit, Justice Buller viewing the subsequent payment as a waiver of objection and a voluntary payment. 4 T.R. at 555, 100 Eng. Rep. at 1173; *see also Elliot*, 35 U.S. (10 Pet.) at 157 (*Greenway* "was evidently considered a case of voluntary payment.").

WBEC's voluntary dismissal of its suit was likewise a waiver. As the court of appeals noted, under state law "the legal effect of such [a] dismissal is as though the action[] had never been filed." Pet. A. 11a (citing *Nolan v. Workers' Compensation Appeals Bd.*, 138 Cal. Rptr. 561, 564 (Dist. Ct. App. 1977)). Accordingly, there was no tolling of the ninety day filing period of Cal. Rev. & Tax. Code § 6933. *Id.* Because in keeping with the common law rule, state law further provides that "[f]ailure to bring [an] action within the time specified *constitutes a waiver of any demand against the State* on account of alleged overpayments," Cal. Rev. & Tax. Code § 6933 (Deering 1975 & Supp. 1992) (emphasis added), WBEC waived its objection to the assessment.

Because California's retention of the tax in dispute does not constitute unjust enrichment under the common law with respect to WBEC, the United States' claim can rest on neither the principle of subrogation nor assignment. *See, e.g., United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947); *United States v. Nashville, Chatt. & St. Louis Ry.*, 118 U.S. 120, 125 (1886).

[6] In criticizing the court of appeals' holding that the United States was required to pursue California's administrative refund procedure, the United States notes that "[a] refund request . . . was, however, submitted by the federal contractor." Brief of U.S.

B. There Is No Sound Reason For Excusing The United States From Complying With The Common Law Rule

The United States ignores this fundamental principle of the law of unjust enrichment. Instead it argues that "its rights are not circumscribed or limited by state procedures, 'state statutes of limitations,' or 'state notions of laches.'"[6] Brief of U.S. at 18 (quoting *Board of County*

Comm'rs v. United States, 308 U.S. 343, 351 (1939)).[7] To be sure, this Court has held that in some circumstances, the United States, in enforcing its rights, cannot be barred by either state statutes of limitations or laches. *See United States v. John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Board of County Comm'rs*, 308 U.S. at 351. But none of the cases cited by the United States held in any sense that it is excused from complying with a State's administrative refund procedure when it pursues a claim founded on state law. *See generally id.*; *cf. United States v. Burnison*, 339 U.S. 87, 91-93 (1950) (United States, in pursuing claim based on state law, could not rely on Supremacy Clause to invalidate state law); *United States v. Fox*, 94 U.S. 315, 320-21 (1877) (same).

Moreover, when the United States asserts a cause of action, it is required to establish a prima facie case on each element of a cause of action in the same manner as a private litigant.[8] *See, e.g., United States v. Stinson*,

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at 17 n.8. While the significance of this point is not entirely clear, if the United States means that it should be excused from compliance with California's administrative refund procedure because WBEC pursued such a claim, that can hardly be squared with its other contention—that the enforcement of its rights cannot be left "to the diligence of disinterested federal contractors." *Id.* at 27.

[7] The United States cites *Board of County Comm'rs* for the proposition that it cannot be subjected to state administrative procedures. Brief of U.S. at 18. While *Board of County Comm'rs* does discuss the applicability of time bars, it neither discusses nor even obliquely refers to administrative procedures.

[8] The only case even arguably supporting the United States is *Causey v. United States*, 240 U.S. 399 (1916), in which the United States brought a suit in equity to annul public land patents fraudulently obtained. In *Causey*, defendants argued that the suit could not be maintained because the United States had not offered to return the consideration received. *Id.* at 402. The "ordinary rule" was "that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received." *Id.* The Court rejected Causey's argument, noting that "the purpose [of the suit] is not merely to regain title, but also to enforce a public

197 U.S. 200, 204-05 (1905) ("The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual."); *Nashville, Chatt. & St. Louis Ry. Co.*, 118 U.S. at 125 ("When the United States, through their lawfully authorized agents, become the owners of negotiable paper, they are obliged to give the same notice to charge an endorser as would be required of a private holder."); *see also Cooke v. United States*, 91 U.S. 389, 398 (1875); *United States v. Barker*, 25 U.S. (12 Wheat.) 559, 561 (1827). As this Court recognized in *First Nat'l Bank*, exhaustion of state administrative refund procedures is a condition precedent to the right to sue for restitution and an element of the federal cause of action. 264 U.S. at 455-56. The United States is thus in error when it asserts that the court of appeals' "decision turns the Supremacy Clause on its head" because "[t]he existence of a state remedy cannot preempt a federal remedy." Brief of U.S. at 23. The Supremacy Clause is hardly turned on its head when the federal remedy itself requires exhaustion of state administrative remedies as an element of the cause of action. *First Nat'l Bank*, 264 U.S. at 456; *cf. McNary*, 454 U.S. at 116; *Illinois Commerce Comm. v. Thomson*, 318 U.S. 675, 686 (1943).[9]

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statute and maintain the policy underlying it" and that it was for Congress to decide whether the consideration should be refunded. *Id.* Accordingly, the United States did not sue under the same cause of action as was available to private litigants. Moreover, given that the United States was enforcing a congressional enactment, any court-imposed requirement that it must return the consideration in order to maintain the suit would have invoked serious separation of powers concerns. In the instant case, however, the United States has not sued to enforce a congressional enactment but to recover funds alleged to have been exacted in violation of state tax law. The United States should thus be treated no differently than any other taxpayer.

[9] Moreover, it cannot be said that California's administrative refund procedure "unduly circumscribe[s]" the United States' rights. *See* Brief of U.S. at 23 (quoting *Board of County Commis-*

Given (1) that the federal common law remedy has long required exhaustion of state administrative remedies and (2) that there can be no argument that the tax assessed here violated the Supremacy Clause, there is no reason to excuse the United States from complying with the common law rule. On its own behalf, the United States does little more than state its bald conclusion that its "sovereign interests . . . should not be subordinated to the vagaries of a mosaic patchwork of state procedure."[10] Brief of U.S. at 28. But "our Constitution establishes a system of dual sovereignty between the States and the Federal Government," *Gregory v. Ashcroft*, 111 S.Ct. 2395, 2399 (1991), for it is "founded upon the total or partial incorporation of a number of distinct sovereignties." Alexander Hamilton, *The Federalist* No. 82, p. 458 (I. Kramnick ed., 1987). "[T]he Court's consistent understanding" is that " 'The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.' " *New York v. United States*, 112 S.Ct. 2408, 2418 (1992) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985)). Neither sovereign has the power to "destroy the other nor curtail in any substantial manner the exercise of its powers." *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926).

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sioners, 308 U.S. at 351). California's procedure does not discriminate against the United States but applies to all claimants seeking a refund. *See* Cal. Rev. & Tax. Code § 6906 (Deering 1975 & Supp. 1992). Nor is it burdensome. The claim can be "in writing" and need only "state the specific grounds upon which [it] is founded." *Id.* at § 6904. There is no filing fee. *See generally id.* at §§ 6901-08. Finally, the very notion that the United States' rights cannot be "unduly circumscribed" implies that its rights can be limited by reasonable state law requirements when it acts as a plaintiff.

[10] The United States does present a parade of the horribles that it asserts will occur if it is subjected to state procedures. *See* Brief of U.S. at 26-27. As we explain at pp. 27-30, *infra*, the United States' arguments do not withstand serious scrutiny.

No function of state government goes more to the core of its sovereignty than the power to tax. *See, e.g., Bode v. Barrett*, 344 U.S. 583, 585 (1953). Federal interference with that function, whether by the courts or Congress, has limitless potential to disrupt the operation of state governments. Accordingly, this Court has long recognized "the important and sensitive nature of state tax systems and the need for federal-court restraint when deciding cases that affect such systems." *McNary*, 454 U.S. at 102. As long ago as *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108 (1871), this Court stated:

> It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in proceedings of the officers, upon whom the duty is devolved of collecting taxes, may derange the operations of government, and thereby cause serious detriment to the public.

78 U.S. (11 Wall.) at 110. This Court has steadfastly adhered to these principles in rejecting various attempts to interject the federal courts into state tax matters. *See generally McNary*, 454 U.S. at 102-103, 107-113 (Section 1983 action); *see also Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (declaratory judgment action); *Matthews v. Rodgers*, 284 U.S. 521 (1932) (suit for injunction); *First Nat'l Bank*, 264 U.S. at 453-56 (action for money had and received); *Singer Sewing Mach. Co. v. Benedict*, 229 U.S. 481 (1913) (suit for injunction).

Requiring the United States to comply with California's administrative refund procedure cannot in any sense be characterized as an attempt by the State to destroy the United States as sovereign or substantially curtail the exercise of its rights. *Metcalf & Eddy*, 269 U.S. at 523. California only seeks to impose the same requirement on the United States that it imposes on every other party seeking a tax refund from the state treasury. The purpose

of this requirement is not to discriminate against the United States nor unduly burden it with an additional hurdle to obtaining relief. Rather, the State's purpose is to provide an efficient mechanism for the timely and correct resolution of disputes, avoid needless disruption of its fiscal planning, and ensure that the administrative agency it has charged with responsibility for administering its tax laws will be given the first opportunity to apply its expertise. If, indeed, the Board has gotten it wrong (presumably because WBEC, as a "disinterested" and "nominal party with no financial stake in the ou come" presented inadequate arguments to it, *see* Brief of U.S. at 27), then requiring the United States, as "the real party in interest," *id.*, to present its arguments to the Board is essential to the proper resolution of its claim.

A contrary holding would, by contrast, substantially curtail California's exercise of its sovereignty. Section 6384 is ambiguous as to whether the property purchased by WBEC for the use of the subcontractors it managed is subject to taxation.[11] This ambiguity should be resolved, in the first instance, by the State's administrative agency—not by federal judges who lack expertise in California's tax code.[12] *Cf. Pullman*, 312 U.S. at 499-

[11] In providing for the taxation of sales of personal property to federal contractors "purchasing such property either as the agents of the United States or for their own account and subsequent resale to the United States for use in the performance of contracts with the United States for the construction of improvements on or to real property," Section 6384 does not state that purchasers of property are subject to tax only if they actually perform the construction.

[12] It is well established that the California courts defer to the Board's reasonable interpretation of the California Revenue and Taxation Code. *See, e.g., Coca Cola Co. v. State Bd. of Equalization*, 25 Cal. 2d 918, 921 (1945) (administrative interpretation of tax laws "is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized"); *American Hospital Supply Corp. v. State Board of Equalization*, 215 Cal. Rptr. 744, 746 (Dist. Ct. App. 1985) ("Administrative interpretation of a statute by the agency charged with its enforce-

501; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).

Moreover, the federal courts cannot grant the United States the relief it seeks without interpreting section 6384 in a manner that conflicts with the prior and presumptively valid interpretation of the statute given by the State's agency in the administrative proceeding brought by WBEC. Such an interpretation would go well beyond creating " 'needless friction with state polic[y].' " *Burford*, 319 U.S. at 332 (quoting *Pullman*, 312 U.S. at 500). Rather, it would necessarily intrude on California's exercise of its sovereignty by precluding it from taxing in a constitutionally authorized manner. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). As the Court has recognized, the sovereign power of the United States does not include the power to "curtail in any substantial manner [California's] exercise of its powers." *Metcalf & Eddy*, 269 U.S. at 523. If the United States is to resort to the federal courts whenever it believes a contractor has been taxed in violation of state law, then, at a minimum, this Court must require the United States to have presented its arguments to the taxing authority to "give [it] a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. The "important and sensitive nature of state tax systems," *McNary*, 454 U.S. at 102, and the Court's " 'scrupulous regard for the rightful independence of the state governments,' " *Burford*, 319 U.S. at 332 (*quoting Pullman*,

ment is entitled to great weight unless shown to be clearly erroneous or unauthorized."). This rule also applies to the Board's interpretation of its regulations. *See, e.g., id.* "The Board's administrative determination" concerning the application of a tax statute or regulation "may be overturned only if that determination is 'arbitrary, capricious or without rational basis.' " *Id.* (*quoting Culligan Water Conditioning v. Board of Equalization*, 130 Cal. Rptr. 321, 324 (Cal. 1976)).

312 U.S. at 501), require no less.[13] The United States' status as sovereign thus provides no basis for exempting it from complying with the long settled rule "that administrative remedies must be exhausted as a necessary prerequisite to a judicial challenge of the tax." *First Nat'l Bank*, 264 U.S. at 455.

II. THE SIX YEAR STATUTE OF LIMITATIONS OF 28 U.S.C. § 2415(a) DOES NOT PREEMPT CALIFORNIA LAW

The United States has never complied with this condition precedent to its right to sue for restitution. The Court thus need not address whether 28 U.S.C. § 2415(a), which provides for a six year statute of limitations for "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact," preempts California's requirement that a refund suit be filed within ninety days following the denial of an administrative refund claim. *See* Cal. Rev. & Tax. Code § 6933 (Deering 1975 & Supp. 1992). Even if 28 U.S.C. § 2415(a)'s six year statute of

[13] To be sure, the federal courts have jurisdiction over any "Controvers[y] to which the United States shall be a Party." U.S. Const. art. III, § 2, cl. 1. In the absence of an authoritative decision of the state courts, the existence of jurisdiction in the federal courts does not warrant their deciding a question of state tax law. At least thirty-five States authorize their courts to answer questions of state law upon certification by the federal courts. Paul M. Bator, *et al., Hart and Wechsler's The Federal Courts and the Federal System* 1381 (3d ed. 1988). In those instances where the United States has exhausted the available state administrative remedies, a federal court could retain jurisdiction while using the procedure available for certifying questions of state law to the state courts. *See, e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). If the state court decides that the state taxing authority has misinterpreted the statute, the federal court can then grant relief upon that basis to the United States without intruding on state sovereignty because it will merely be applying the decision of the state court. This procedure, however, would not be available in cases similar to this one. Because the United States never acquired a cause of action, the federal courts cannot retain jurisdiction while they wait for the United States to exhaust administrative remedies.

limitations applies and the United States' cause of action on each claim did not accrue until WBEC's administrative refund claims were denied on November 22, 1982, and August 2, 1983, respectively,[14] the six year limitations period has since expired without the United States having exhausted its administrative remedies. Accordingly, *amici* submit that the Court can affirm the decision of the court of appeals on this basis alone.

In the event that the Court determines that it must decide whether section 2415(a) displaces California law, *amici* submit that Congress cannot preempt a State's choice to limit the time period in which a refund suit may be brought when that suit is not premised on any violation of the Constitution but relies solely on state law for the entitlement to the refund. The decisions relied on by the United States, *Board of County Comm'rs*, *Summerlin*, and *John Hancock*, do not support the proposition that the Constitution authorizes congressional preemption of California's refund suit limitations period as applied here. None of these cases involved a suit by the United States against a State—an entity whose independent sovereignty is expressly recognized by the Constitution.[15] *See, e.g.*,

[14] The United States took this position in the court of appeals. *See* Brief for Appellant at 14, *United States v. California*, 932 F.2d 1346 (9th Cir. 1991) (No. 89-15833).

[15] To be sure, in *United States v. Minnesota*, 270 U.S. 181 (1926), this Court rejected the State's claim that suit was barred by a state statute of limitations. *Id.* at 195-96. The nature of the United States' claim in *Minnesota*, however, was far different from that which it asserts here and did not implicate principles of federalism in a manner similar to this case. In *Minnesota*, the United States brought suit to cancel land patents it granted to the State under the swamp land grant. *Id.* at 192. The United States filed the suit largely because of a treaty obligation it had with the Chippewa Indians "to apply the lands and the proceeds of their sale exclusively to the use, support, and civilization of the" tribe. *Id.* The Constitution, however, commits the treaty power to the President and the Senate, *see* U.S. Const., art. II, § 2, cl. 2; and, under the Supremacy Clause, a treaty preempts contrary state law. *Id.*, art. VI, cl. 2. In the face of these constitutionally explicit grants of

U.S. Const. amend. X; *New York*, 112 S. Ct. at 2417-18; *Gregory*, 111 S.Ct. at 2399.

Moreover, a holding by this Court that section 2415(a) preempts California law would substantially curtail California's exercise of its sovereignty. Under the United States' view, its causes of action did not accrue until the Board denied WBEC's administrative refund claims; the six year statute of limitations of section 2415(a) thus did not begin to run until the Board denied WBEC's claims. In effect, the United States asks the Court to grant it an "open season" for challenging state tax assessments to long beyond the time when those funds were spent. A holding adopting this position will upset the States' reliance upon the finality of their tax assessment and refund proceedings, create uncertainty in state fiscal affairs, and prompt additional litigation. Recognizing the need for finality in their State's fiscal affairs, the people of California have chosen to limit the time period in which they have waived their sovereign immunity by allowing refund suits to be brought. Where, as here, a suit seeks a refund of a tax allegedly assessed in violation of state law and not the Supremacy Clause, failure to honor California's choice to limit the time in which it can be sued "curtail[s] in . . . substantial manner the . . . exercise of its power" in the core sovereign area of taxation.[16] *Metcalf & Eddy*, 269 U.S. at 523; *see also McNary*, 454 U.S. 102-03, 110-12.

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authority to the federal government, Minnesota's claim that the suit was barred by its statute of limitations did not implicate any principle of federalism. Indeed, a holding by this Court that the United States' claim was barred by Minnesota's statute would have "curtail[ed] in . . . substantial manner the [federal government's] exercise of its powers." *Metcalf & Eddy*, 269 U.S. at 523.

[16] California's ninety day filing period has not "curtailed in . . . substantial manner the [federal government's] exercise of its power." *Metcalf & Eddy*, 269 U.S. at 523. California's ninety day period for filing a refund suit only commences once the Board denies a refund claim. It thus does not include the time which elapses from the taxpayer's receipt of a deficiency determination

Finally, even if Congress has the power to preempt California's limitations period, this Court has long required Congress to have faced up to its choice before it construes legislation as altering the traditional balance between the federal government and the States. *See, e.g., Gregory*, 111 S.Ct. at 2401 (quoting cases). "[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)). This plain statement rule thus ensures that the "procedure for lawmaking on which *Garcia* relied to protect states' interests" will not be circumvented by Congressional ambiguity. *Gregory*, 111 S.Ct. at 2403 (quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).

Section 2415(a) fails this critical test. While the text of the statute refers to "every action for money damages . . . founded upon any contract express or implied in law or fact," 28 U.S.C. § 2415(a), it makes no explicit reference to the States or to its applicability in the state tax refund context. Yet the statute expressly addresses its

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until that determination becomes final (which may include the time involved in filing a petition for redetermination if the party chooses to do so), *see* Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992); the six-month period for filing an administrative refund claim that commences when a deficiency determination becomes final, *see id.* § 6902; nor the period that elapses while the administrative claim is being litigated and adjudicated. As the record indicates with respect to the deficiency covering the period Nov. 14, 1975, through December 31, 1977, more than four and a half years elapsed from California's issuance of the initial deficiency determination on July 5, 1978, until WBEC filed its suit challenging this assessment on February 18, 1983. *See* J.A. 9, 22, 24. The record further indicates that the United States was aware of the assessment at least as early as January 8, 1981, twenty-two months before the required filing of the administrative refund claim and more than two years before the required filing date of the refund suit. *See* J.A. 57-58 (statement of Arthur Armstrong, attorney for WBEC).

applicability to government suits against employees for "the recovery of money erroneously paid to" them, 28 U.S.C. § 2415(d), another category of cases brought under the action for money had and received. It is unlikely that Congress would give this situation special attention—to "provide for an equitable and realistic solution which is in the interest of both the Government and the individual concerned," Senate Comm. on Judiciary, S. Rep. No. 1328, 89th Cong., 2d Sess (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2505—while at the same time preempting state statutes of limitations in refund suits without giving that matter any attention. Given the traditional solicitude which Congress has shown for state tax administration, *see* 28 U.S.C. § 1341 (Tax Injunction Act), Congress would not have preempted state tax refund limitations periods without expressly stating so.

The legislative history of section 2415 confirms this view. The Senate Report incorporates language from the House Report, H.R. Rep. No. 1534, expressing the purpose of the statute—that "*private litigants* can be assured of a more fair and balanced treatment when dealing with the Government." S. Rep. No. 1328, *reprinted in* 1966 U.S.C.C.A.N. at 2503 (emphasis added); *see also id.* at 2509 ("In recommending this legislation, the committee feels that it will provide a greater fairness as regards *private individuals* who deal with the Government while adequately providing for the interests of the Government.") (emphasis added). The legislative history makes no similar reference to the States as litigants and, in the only language mentioning the States, the Senate Report merely notes the similarity of the legislation to state law. *See id.* at 2507 (discussing exclusions from limitations period), 2508 (general discussion). Given the failure of Congress to mention expressly that it intended to preempt the States' tax refund limitations periods, the general purpose of the legislation to limit the time period in which the federal government

could bring its suits, and Congress' statements that the legislation was similar to state laws, it is clear that Congress did not intend for section 2415(a) to preempt California's limitations period.

III. REQUIRING THE UNITED STATES TO COMPLY WITH STATE PROCEDURES DOES NOT DEPRIVE IT OF AN EFFECTIVE REMEDY

In the United States' view, many untoward consequences flow from the judgment below. First, it asserts that "[t]he court of appeals' decision would often leave the United States without an effective remedy to contest" an improperly exacted tax. Brief of U.S. at 26. According to the United States, many States "allow only the putative taxpayer [and] not third parties . . . to file an administrative refund claim" and refund suit. *Id.* Next, the United States argues that it "cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effectively in the state administrative process." *Id.* at 26-27. The United States further argues that limiting it to state remedies "effectively requires the litigation to be waged by the . . . contractor—a nominal party with no financial stake in the outcome." *Id.* at 27. Finally, the United States predicts that "confusion would reign . . . if the United States were left to the laws of the 50 States" in pursuing its claims. *Id.* None of these contentions can withstand scrutiny.

The United States' first contention—that it lacks an effective state remedy because California as well as many other States allow only the putative taxpayer and not third parties to file administrative refund claims and refunds suits—is contradicted by the opportunity it had, as a real party in interest, to participate in both the administrative and civil actions under California law. For example, Cal. Rev. & Tax. Code § 6561 (Deering 1975 & Supp. 1992) specifically provides that not only the taxpayer but also "any person directly interested may petition [the Board] for a redetermination" of a defici-

ency determination. Moreover, under Cal. Civ. Proc. Code § 387, the United States could have intervened, as a matter of right, in the state court proceedings.[17] *See, e.g., Timm Aircraft Corp. v. Byram*, 213 P.2d 715 (Cal. 1950); *Kaiser Co. v. Reid*, 184 P.2d 879, 881 (Cal. 1947). Finally, the United States could have filed a refund claim.

The United States' second contention—"that it cannot reasonably be expected to be aware of the tax (or the legal issues involved) in sufficient time to participate effectively in the state administrative process"—is similarly contradicted by the record, the nature of cost-plus contracts, and its own regulations. As the record indicates, the United States was aware of the assessment as early as January 8, 1981, the date of the hearing on WBEC's petition for redetermination. *See* J.A. 57-58 (statement of Arthur Armstrong, attorney for WBEC). Moreover, under Cal. Rev. & Tax. § 6902, the administrative refund claim was not required to be filed until six months after the Board's decision on the petition became final.[18] As the record indicates, the Board's Notice of Redetermination did not become final until approximately May 13, 1982, and, consequently, the administrative refund claim was not required to be filed for another six months. *See* J.A. 26; *see also* Cal. Rev. & Tax. Code § 6902 (Deering 1975 & Supp. 1992). A minimum of twenty-two months thus elapsed from the time the United States was aware of the assessment until it was required to file in the administrative refund action. The United States' suggestion that it lacked ample time

[17] Similar rules apply in other States. More than thirty States, for example, have adopted the Uniform Law Commissioners' Model State Administrative Procedure Act (1981). *See* Walter Gellhorn *et al., Administrative Law* 1238-42 (1987). Section 4-209 specifically provides for intervention in adjudicative proceedings. *See id.* at 1269.

[18] In addition, under California law, the Board's decision on the petition for redetermination did not become final until "30 days after service upon the petitioner of notice thereof." Cal. Rev. & Tax. Code § 6564 (Deering 1975 & Supp. 1992).

to participate effectively in the administrative refund action simply strains credulity.

Moreover, it is difficult to fathom why the United States cannot write its contracts in a manner that will adequately protect its interests by requiring its contractors to notify it whenever a State alleges that additional taxes are due. It is not beyond the power of the United States' lawyers and contracting officers to draft such clauses or to condition reimbursement of any tax assessed on the contractors' timely notification. *See* J.A. 131 (modifying basic contract to require WBEC to "[c]onfer with and provide documentation to DOE on all pertinent developments regarding outstanding litigation"); 48 C.F.R. § 52.229-4 (tax clause, para. (g)) ("The Contractor shall promptly notify the Contracting Officer of all matters relating to Federal, State, and local taxes . . . that reasonably may be expected to result in either an increase or decrease in the contract price and shall take appropriate action as the Contracting Officer directs."); *id.* § 29.304(a) ("With coordination of the agency-designated counsel, a contract may . . . require that the contractor take certain actions with regard to payment, non-payment, refund, protest, or other treatment of a specified tax."); *cf.* 48 C.F.R. § 52.229-4 (tax clause, para. (e)) (providing for decrease in contract price for any tax the contractor "does not obtain a refund of, through the [c]ontractor's fault, negligence, or failure to follow instructions of the [c]ontracting [o]fficer").[19] Finally, the Federal Acquisition Regulations

[19] It is also noteworthy that the Federal Acquisition Regulations (FAR) provide for the insertion of a special clause when a federal contractor operates within the State of New Mexico. This clause includes the following provision:

> The [agency] may receive information regarding the Contractor from the Revenue Division of the New Mexico Taxation and Revenue Department and, at the discretion of the [agency], may participate in any matters or proceedings pertaining to this clause or the above-mentioned agreement. This shall not pre-

contemplate timely notification by instructing contracting officers to discourage contractors "from negotiating independently with taxing authorities" in the case of cost-reimbursement contracts. 48 C.F.R. § 29.101(c).

The United States' final contention—its dire forecast "that confusion would reign if [it is] left to the laws of the 50 states" and if its interests are "subordinated to the vagaries of a mosaic patchwork of state procedure" —simply overstates the practical effect of the court of appeals' holding. When the United States pursues a refund claim it must, after all, necessarily understand the State's substantive tax law—an area recognized for its great complexity. Given this, it is difficult to understand why the United States cannot master the incremental task of determining what the State's refund procedures require. Moreover, throughout this litigation the United States has maintained that its cause of action did not accrue until WBEC's administrative refund claim was denied. Clearly then, to assert the federal remedy, the United States must be cognizant of state administrative procedures for it cannot assert its cause of action before it accrues. And even when a State does not require that an administrative refund claim be filed as a condition precedent to a refund suit, the United States must still be cognizant of state procedures because its cause of action presumably would accrue at an earlier time. In short, even under the federal cause of action, the United States must be aware of a State's administrative refund procedures if it is to vindicate its rights.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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clude the Contractor from having its own representative nor does it obligate the [agency] to represent its Contractor.

48 C.F.R. § 52.229-10 (New Mexico Gross Receipt Tax clause, para. (g)).

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